

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARK J. MCBURNEY, ET AL. :

4 Petitioners :

5 v. :

6 NATHANIEL L. YOUNG, DEPUTY : No. 12-17

7 COMMISSIONER AND DIRECTOR, :

8 VIRGINIA DIVISION OF CHILD :

9 SUPPORT ENFORCEMENT, ET AL. :

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11 Washington, D.C.

12 Wednesday, February 20, 2013

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:19 a.m.

17 APPEARANCES:

18 DEEPAK GUPTA, ESQ., Washington, D.C.; on behalf of
19 Petitioners.

20 EARLE DUNCAN GETCHELL, JR., ESQ., Solicitor General of
21 Virginia, Richmond, Virginia; on behalf of
22 Respondents.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning first in Case 12-17, *McBurney v. Young*.

5 Mr. Gupta.

6 ORAL ARGUMENT OF DEEPAK GUPTA

7 ON BEHALF OF THE PETITIONERS

8 MR. GUPTA: Thank you, and may it please the
9 Court:

10 All 50 States have public records laws. 47
11 of those States make access available to residents and
12 nonresidents on equal terms. Virginia, by contrast,
13 enforces a discriminatory access policy, and because
14 commercial requesters make up the vast majority of
15 records requesters, out of State businesses bear the
16 brunt of Virginia's policy --

17 JUSTICE SCALIA: When -- when was the first
18 of those laws enacted, do you know? I think it's -- I
19 think it's in my adult lifetime that Florida was the
20 first to enact a sunshine law. Is that -- am I correct
21 about that?

22 MR. GUPTA: That's right. All of these
23 laws --

24 JUSTICE SCALIA: In the '60s.

25 MR. GUPTA: In the '60s and the early '70s.

1 The Virginia law was enacted in 1968. And we don't deny
2 that --

3 JUSTICE SCALIA: And you say that's a
4 fundamental -- that's a fundamental right covered by a
5 Privileges and Immunities Clause, which nobody had until
6 the 1960s.

7 MR. GUPTA: Well, to be clear, the modern
8 transparency laws are new, but they sit on top of
9 well-established common law rights to access that are
10 based not on modern notions of transparency but on the
11 right to secure property and other basic interests --

12 JUSTICE SCALIA: But those -- those rights
13 still exist in this State, don't they? Cannot you get
14 records of deeds and whatever the common law would have
15 covered?

16 MR. GUPTA: Well, it's true that -- that
17 Virginia's law exempts deeds from its Freedom of
18 Information law, but if I understand their position
19 correctly, they would be entitled as a constitutional
20 matter under their theory to preclude people from other
21 States from accessing even deeds.

22 JUSTICE SCALIA: Well, I'll ask him -- I
23 didn't understand that to be their position, but -- but
24 I guess we can ask them.

25 MR. GUPTA: My client, Mr. Hurlbert, is in

1 the business of gathering property records for his
2 clients. Now, it's true that in Virginia, he could get
3 the deed, but what he can't get and what he principally
4 gathers for his clients are real estate tax assessment
5 records, and those are a much richer storehouse of
6 property-related information than simply the deed.

7 JUSTICE GINSBURG: Can you -- can you
8 explain that business a little more fully than you did
9 in the briefs? He's in the business of collecting
10 records from all the States about tax assessments.

11 MR. GUPTA: That's right.

12 JUSTICE GINSBURG: And he -- and he does
13 that for a client who could very well ask himself. So
14 what is the service that's being performed?

15 MR. GUPTA: Well, he -- you know, he doesn't
16 just do the routine request. These -- the large data
17 companies are the ones who hire him. And they -- if
18 they're routine requests, they can do them themselves.
19 Although if they're not based in Virginia, they would
20 still have to hire a Virginian to do it. But they bring
21 him in when there's some flaw in the -- the routine
22 process where the -- the State is being recalcitrant, or
23 the local official is being recalcitrant. And he's an
24 expert in being able to gather these -- these records,
25 and knowing the process is knowing what he's allowed to

1 do and what he's not allowed to do.

2 CHIEF JUSTICE ROBERTS: All -- all he has to
3 do is get somebody from -- from Virginia to ask for him,
4 right?

5 MR. GUPTA: Well, he could hire someone from
6 Virginia to do that, but that's -- you know, that's sort
7 of precisely what the --

8 CHIEF JUSTICE ROBERTS: Well, but you don't
9 have to pay the person too much, he just has to write a
10 letter saying give me these documents, right?

11 MR. GUPTA: He would still have to hire
12 someone, and that would be an increased cost.

13 And --

14 CHIEF JUSTICE ROBERTS: Well, an increased
15 cost of -- I don't know how much -- 100 bucks, right?
16 Go -- write a letter, say you want these documents, and
17 when they come to your house, give them to me.

18 MR. GUPTA: Yeah. For the large data
19 companies, you know, they will hire someone other than
20 him to perform this service. They will -- if you're
21 talking about routine requests. But even -- you know,
22 even for them, if you're talking about a -- a request
23 that isn't routine, if he has to do something further to
24 enforce the rights, he's going to have to do that in his
25 own name or the data company will have to hire someone

1 other than him, someone based in Virginia, to do that
2 for them. And then he will lose that business.

3 So the lower you go down in the food chain
4 of the data industry, the bigger the effect of
5 Virginia's policy.

6 JUSTICE GINSBURG: How much -- how much of
7 an impact in fact does it have on his business? I mean,
8 there are 47 States who will provide this information.

9 MR. GUPTA: Well, for him, in the Virginia
10 market, it completely forecloses him from doing
11 access -- business in the Virginia market.

12 And if other States were to have policies
13 like this, he wouldn't be able to do business in those
14 States as well. So if -- if the focus is on him and his
15 business in Virginia, it completely cuts him off. If
16 the focus is on -- on what the effect is in the
17 aggregate on the market as a whole, because most public
18 records requests are commercial requests, it's going to
19 have an effect on most commercial requesters who are out
20 of State. And --

21 JUSTICE SCALIA: Mr. Gupta, I -- I
22 understand that the -- the reasoning of Virginia in not
23 allowing out of State people to -- to get these FOIA
24 requests is the following: That the purpose of these --
25 these laws -- and I remember it when the first ones were

1 enacted -- government in the sunshine. The purpose of
2 it was not to enable people to get information per se,
3 it was to enable people to see how their government is
4 working, so that they could attend to any malfeasance
5 that is occurring in the process of government.

6 It seems to me entirely in accord with that
7 purpose of these laws to say it's only Virginia citizens
8 who -- who are concerned about the functioning of
9 Virginia government, and ought to be able to get
10 whatever records Virginia agencies have. What's --
11 what's wrong with that reasoning?

12 MR. GUPTA: A few responses, Justice Scalia.

13 First, transparency was one purpose, but as
14 I said, these laws also carried forward the much more
15 longstanding rights to access based on personal
16 interests and property interests. Also, even at the
17 time that these laws were enacted --

18 JUSTICE SCALIA: But -- but you don't need
19 any personal or property interest under these laws. You
20 can just -- out of curiosity, if you -- if you were a
21 Virginian at least in Virginia, even though you have no
22 interest in the matter at all, you can ask the agency
23 for records about this or that. It -- it can't be based
24 on -- on the traditional property interest. It's based
25 on the ability of the citizens of the State to find out

1 what the -- what the government of the State is up to.

2 MR. GUPTA: Even -- even at the time that
3 these laws were enacted in the -- in the '60s, it was
4 well-understood that they were going to have a big
5 commercial impact. The property records industry was in
6 full swing by the end of the late 19th Century.

7 JUSTICE GINSBURG: But the point is that
8 FOIA is tied to, as Justice Scalia said, the citizens
9 should know what their government is doing. And you
10 don't have to give any reason at all, if you were a part
11 of that political community. Now, Virginia doesn't
12 allow people from out of State to vote. They're not
13 part of Virginia's political community. So why isn't
14 this -- if you're not part of the political community,
15 then you don't fall under FOIA, which is a peculiar
16 statute, in that everybody who is covered by it can get
17 whatever they want, and they don't have to give any
18 reason for it.

19 MR. GUPTA: Right. Well, elections just
20 simply don't work if you -- if you allow noncitizens to
21 participate in elections, or if you can't wall off the
22 State in that respect. But what the State can't say is
23 simply because one purpose of this law is that we want
24 to constitute ourselves as a political community, that
25 we can exclude activities that have a big commercial

1 effect. And, you know, when we're looking under the
2 Dormant Commerce Clause or under the Privileges and
3 Immunities Clause, this Court's cases have said
4 repeatedly you don't look to uncover the original
5 legislative purpose, you look to whether there is
6 discrimination, which there is here on its face, and you
7 look to whether there is a discriminatory effect.

8 One example of how this policy is actually
9 being --

10 JUSTICE KAGAN: And is the only thing that's
11 necessary -- excuse me -- is the only thing that's
12 necessary that the law affect a few people commercially?
13 I mean, how much -- how many of the requesters have to
14 be engaged in some kind of commercial activity in order
15 for your arguments to work?

16 MR. GUPTA: Well, what this Court has said
17 is that there is no de minimis exception if there's
18 discrimination against commerce, but here, what's going
19 on is anything but de minimis. Virginia does not deny
20 that the -- the vast majority of the requesters are
21 commercial requesters, the vast majority of out of State
22 requesters are commercial requesters.

23 Their -- the amicus brief supporting their
24 side, the Local Government Attorneys of Virginia amicus
25 brief at page 30 explains the way this policy is being

1 implemented, is that noncommercial requests are
2 typically honored, but out of State requests by data
3 miners are being categorically denied under the policy.

4 CHIEF JUSTICE ROBERTS: But this is not --
5 this is not a regulation of commerce. It's a State
6 practice that may have an incidental effect on commerce,
7 and the incidental effect may be disproportionate,
8 depending upon whether you're State or local, but it's
9 not a regulation of commerce.

10 MR. GUPTA: But that's -- that was the
11 Fourth Circuit's theory and I think incidental can mean
12 a few different things, and I think in -- in their
13 opinion, it -- it does mean at least three different
14 things. So maybe it would be helpful if I try to unpack
15 that.

16 If it means incidental in terms of the
17 effect on my client's business -- I think, as I've
18 explained, it's anything but incidental; it completely
19 forecloses him from the market. If it means incidental
20 in terms of the -- the aggregate effect of this statute,
21 again, it's not incidental because the vast majority
22 of -- of affected parties under this policy are
23 out-of-state commercial requesters, particularly data
24 companies. And, you know, if it means incidental
25 compared to the purpose of the statute, as I've said,

1 transparency was one purpose of the modern FOIA laws,
2 but they also subsumed and sit on top of all of the
3 longstanding rights of public access that have been
4 around since the -- the first settlements in the United
5 States -- or before the United States, when in order to
6 have a functioning property system, we recognized that
7 you've got to have records of who owns what and -- and
8 those records have to be made available to anyone in
9 order to exercise property rights.

10 CHIEF JUSTICE ROBERTS: What if the State of
11 Virginia says, as a policy, we want to help Virginia
12 businesses and so we're going to open a business
13 training, best practices institute where you're going to
14 learn how to be a better business person, but the only
15 people who can come in are -- are Virginia businesses.

16 MR. GUPTA: Right.

17 CHIEF JUSTICE ROBERTS: Under your theory,
18 because that will have an effect, an incidental effect
19 on commerce in a way that's discriminatory, is -- is
20 that unconstitutional?

21 MR. GUPTA: I don't think so. And there are
22 a couple of distinctions.

23 First, that's not something that the State
24 exclusively is able to provide. It's not like the
25 courthouse or the public archives across the street or

1 the road that runs between them that only the -- the
2 State is able to provide. Anyone can provide a business
3 training institute, so the State is just one player
4 among many. Also --

5 JUSTICE SCALIA: But that -- that just goes
6 to the extent of the impact, not -- not on the
7 principle. And you say extent doesn't matter. You say
8 there's no such thing as a de minimis exception. So
9 that -- that explanation doesn't -- doesn't seem to me
10 to hold water.

11 MR. GUPTA: Well, maybe I didn't explain it
12 very well. To be clear, I think it's more than just a
13 difference in degree; it's a difference in kind. These
14 are fundamentally different when -- when you're talking
15 about running the courthouse or running the public
16 archives, nobody else can do that. Nobody else can
17 collect -- you know, make tax assessments, collect those
18 records and keep the official public archive of those
19 things.

20 JUSTICE SCALIA: So what? So what? Except
21 to the extent that that bears upon how much of an
22 imposition this is upon interstate commerce. It seems
23 to me that's the only relevance of that point.

24 MR. GUPTA: Well --

25 JUSTICE SCALIA: And -- and you dismiss that

1 relevance. You say it doesn't matter how extensive the
2 impact is on -- on interstate commerce.

3 MR. GUPTA: Well, to the extent that you --
4 you think it does matter, I mean, that -- that
5 distinction doesn't matter in this case because the
6 impact is -- is great. The principal impact is an
7 impact on out-of-state commerce.

8 But let me --

9 CHIEF JUSTICE ROBERTS: Is that -- when
10 you're talking about impact, is that a Pike analysis?

11 MR. GUPTA: No. I think this -- if you were
12 in -- in the dormant Commerce Clause, this would be the
13 per se rule of invalidity. You have facial
14 discrimination. The -- the --

15 CHIEF JUSTICE ROBERTS: Well, I thought if
16 it was facial discrimination, you're not concerned about
17 impact.

18 MR. GUPTA: That's right. That's right.

19 CHIEF JUSTICE ROBERTS: I thought a question
20 of talking about the effects on interstate commerce,
21 that's the, you know, the Pike analysis.

22 MR. GUPTA: No. What this Court has said is
23 that -- that the first -- sort of first-tier scrutiny,
24 the per se rule is -- is for cases where there's
25 discrimination on its face or discrimination in effect.

1 And then you've got this other category for the -- the
2 Pike analysis where the State regulates evenhandedly.

3 JUSTICE KENNEDY: What's your closest case
4 in support of the proposition that this is impermissible
5 as a discrimination against interstate commerce? What's
6 your best case?

7 MR. GUPTA: When you say "this," you mean
8 the -- that public records access is commerce?

9 JUSTICE KENNEDY: If -- if you -- you are
10 arguing, as one of your arguments here, that this is
11 discriminatory as to -- as to interstate commerce, as I
12 understand your argument, what is the best case you have
13 to support your position? What's the closest case?

14 MR. GUPTA: Well, I think if you're -- if
15 you're -- if the question is about whether or not
16 records access is commerce, there's *Reno v. Condon* this
17 Court's unanimous --

18 JUSTICE KENNEDY: Well, my question is
19 what's the best case you have for your argument?

20 MR. GUPTA: Well, I think, you know, this
21 Court's unanimous decision in *Reno v. Condon* held that
22 because people buy public records and sell them in
23 interstate commerce, that's indisputably interstate
24 commerce. So we --

25 JUSTICE KENNEDY: But that wasn't a

1 discrimination. That wasn't a --

2 MR. GUPTA: That's right.

3 JUSTICE KENNEDY: That's just -- that goes
4 to the question whether or not this is commerce.

5 MR. GUPTA: That -- that's right.

6 JUSTICE KENNEDY: What is your best case to
7 show that this is discriminatory in violation of our
8 precedence?

9 MR. GUPTA: Well, Virginia doesn't deny that
10 there's discrimination on its face, so I take your
11 question to be asking, you know, what about the commerce
12 aspect. And in *Reno v. Condon* --

13 JUSTICE KENNEDY: If I have to write the
14 opinion, what case do I put down? I'm waiting.

15 MR. GUPTA: Yeah, I mean, you -- okay. So
16 you can also look to *Camps Newfound*, which, I think, you
17 know, was much, more attenuated to commerce. There you
18 had a generally applicable law, a property tax law --

19 JUSTICE BREYER: If I only have time to read
20 one case --

21 MR. GUPTA: Yeah.

22 JUSTICE BREYER: -- or possibly two, which
23 would you like me to read? I think that's basically the
24 question.

25 MR. GUPTA: Yeah. I mean, you know, look.

1 There's no case that's -- that's entirely on all fours,
2 but --

3 JUSTICE BREYER: Okay. But I assume you
4 don't want me --

5 JUSTICE KENNEDY: That's why you're here.

6 MR. GUPTA: So right. So -- so -- okay. So
7 the Camps Newfound case is -- is a case where you had a
8 generally applicable law. It was a property tax law.
9 It exempted, you know, charities that served primarily
10 in-state residents. It was -- there is no evidence that
11 the State of Maine intended that to be a, you know, a
12 discrimination against commerce, and obviously swept
13 more broadly and affected both commerce and
14 non-commerce. But this Court said that, you know, you
15 had facial discrimination against commerce because there
16 were people operating these summer camps and they were
17 treated differently --

18 JUSTICE BREYER: Look at those. But I think
19 the Commerce Clause basically has as its objective,
20 insofar as it's dormant, to prevent a legislature or
21 decisionmaker within its State discriminating in favor
22 of their own state producers.

23 MR. GUPTA: Right.

24 JUSTICE BREYER: Now, it's pretty hard for
25 me to put this case into that mold.

1 MR. GUPTA: Well, I mean, one -- you know,
2 one piece of evidence, Justice Breyer, is the media
3 exception to the Virginia statute. It -- this -- this
4 makes it clear that Virginia was aware that people who
5 were requesting information for commercial purposes were
6 going to use this statute and they exempted the press --

7 JUSTICE SCALIA: Just Virginia media,
8 though, isn't it? Isn't it only media that --

9 MR. GUPTA: That's right, Justice Scalia.

10 JUSTICE SCALIA: -- exists or is broadcast
11 into Virginia?

12 MR. GUPTA: That's right. So it's --
13 it's --

14 JUSTICE SCALIA: So that's consistent with
15 their purpose that this statute is meant to assure good,
16 honest government in Virginia.

17 MR. GUPTA: Well, if this is a statute, it's
18 a pretty unusual statute that discriminates among
19 newspapers. So it says --

20 JUSTICE BREYER: If it does what the -- I
21 had exactly the same question for both parts of your
22 argument, that, what it's their -- am I right in
23 thinking that anyone can get any information -- anyone
24 in any State can get any information that pertains to
25 him or her? Is that right or not?

1 MR. GUPTA: There is a separate Virginia --

2 JUSTICE BREYER: Is that right or not?

3 MR. GUPTA: Yes. There is a
4 separate Virginia statute that allows this.

5 JUSTICE BREYER: Okay. That's what I wanted
6 to know, whether it's separate or not.

7 MR. GUPTA: That's right.

8 JUSTICE BREYER: Anyone from Alaska to
9 Hawaii can get any information that pertains to him or
10 her.

11 Second, that this has nothing to do with
12 judicial records. There is a different statute that
13 makes judicial records public.

14 MR. GUPTA: That's correct.

15 JUSTICE BREYER: Okay. So we're now talking
16 about the class of information other than the two
17 classes I've mentioned.

18 And I then ended up, and I'd like you to add
19 something to this, if you can, that really this is
20 about, since getting information involves usually a
21 benefit to the recipient, but sometimes harm to the
22 person the information is about, that willing to run
23 that harm and risk of harm is the interest in State good
24 government, okay?

25 MR. GUPTA: Uh-huh.

1 JUSTICE BREYER: Now, if that's the
2 interest, that's an interest that probably a State has
3 the right, just as it has the right to say other people
4 can't vote in State elections. If that's the interest,
5 then I guess it could take reasonable measures related
6 to that interest.

7 All right. Now, that is the -- the argument
8 or the position that I would appreciate your addressing.

9 MR. GUPTA: Sure. You know, that -- we
10 don't deny that that's an interest that the State has,
11 but then you have to see whether the -- the interest is
12 reasonably furthered by the statute. And here you have
13 a resource that is not finite and the statute allows the
14 State to recoup its expenses. So nothing is lost to
15 Virginians. There isn't any loss in transparency to
16 Virginians by extending access to out-of-state data
17 companies.

18 JUSTICE GINSBURG: But if it costs for
19 Virginia -- Virginia has to take care of its own, and if
20 it has to service FOIA requests from all over, it's
21 going to cost the State. It's going to have to hire
22 people to do this. They're going to have to spend many
23 hours going through these records. So the State
24 doesn't -- it wants to conserve its resources for its
25 own people.

1 MR. GUPTA: But -- but there's no loss in
2 resources, Justice Ginsburg, because the statute allows
3 Virginia to fully recoup any administrative expenses.

4 JUSTICE SOTOMAYOR: Counsel, I'm having --

5 JUSTICE SCALIA: But they -- but they just
6 don't want out -- they -- they don't want outlanders
7 mucking around in -- in Virginia government. It's
8 perfectly okay for good old Virginians to do that, but
9 they don't want outlanders to do it. Why -- why is that
10 unreasonable?

11 MR. GUPTA: Yeah. That -- that is certainly
12 their interest. But you've got to see whether the
13 policy serves -- serves, you know, the interest, and --
14 and this is a statute that is supposed to promote
15 transparency. It actually makes less transparent.

16 JUSTICE SOTOMAYOR: Counsel, I'm -- I --
17 there is underlying your argument a sort of fundamental
18 belief that you are entitled to relief -- pardon the
19 alliteration simply because the statute discriminates
20 between citizens and noncitizens. Is that your
21 position?

22 MR. GUPTA: No, not at all. I mean --

23 JUSTICE SOTOMAYOR: So if it's not, what are
24 the two rights that you -- or what rights are it that
25 you're claiming have been violated? You say privileges

1 and immunities. What's the privilege or immunity?

2 MR. GUPTA: It's the privilege or immunity
3 of pursuing a common calling across State borders. So
4 there's no dispute here that Mr. Hurlbert's common
5 calling is -- is gathering data. In fact, those are the
6 principal users of public records laws.

7 JUSTICE SOTOMAYOR: So is this an as-applied
8 challenge to the --

9 MR. GUPTA: That's right.

10 JUSTICE SOTOMAYOR: All right.

11 MR. GUPTA: That's right.

12 JUSTICE SOTOMAYOR: So this is an as-applied
13 challenge.

14 MR. GUPTA: Yes. So -- so it's an
15 as-applied challenge with respect to Mr. Hurlbert's
16 common calling. There's no -- there's no dispute that
17 that is his common calling and that this law has the
18 effect of completely cutting him off from pursuing his
19 common calling in the Virginia market and that 47 other
20 States --

21 JUSTICE GINSBURG: Then you would be doing
22 something very strange with this statute, because you
23 would be saying Hurlbert has a right to this because
24 it's his business. But the statute, the character of
25 this statute is it doesn't matter what you want the

1 information for. But you're saying the out-of -- the
2 in-Stater, it doesn't matter. Out-of-Stater, is it your
3 argument that if this out-of-Stater has a good reason
4 for getting this and it's related to the out-of-State's
5 business, so you -- you're changing the character of a
6 FOIA statute which is it doesn't matter what you want it
7 for.

8 MR. GUPTA: Right. I mean, you would, you
9 know, we would -- we would ask that you rule that the
10 statute is unconstitutional as applied to him and then
11 Virginia would have the choice if it has a to the
12 statute --

13 JUSTICE SOTOMAYOR: I -- I'm having a
14 problem, and then I think it's Justice Ginsburg's
15 problem, which is absent the statute, he can't demand
16 that Virginia provide him with this information because
17 that's how he wants to work, correct? So what's the
18 added value that gives him a right to demand it merely
19 because a statute exists? He doesn't have a right to
20 the information.

21 MR. GUPTA: Well, he's -- all he's asking
22 for is information that's available in the public
23 archives on equal terms with Virginians. In the same
24 way that -- that someone who --

25 JUSTICE BREYER: He -- he has a very

1 reasonable request in my view, but the question isn't
2 the reasonableness of his request. The question's, you
3 know, whether they can do it. And the -- the way -- the
4 work -- the thing that's bothering me on the work part
5 is this: It seems that the work is sort of tailored to
6 the statute. It's in this way. I -- I have a job and
7 my job is to study election processes. And I write
8 reports and I find amazing things about differences
9 among States. They're truly amazing. And I say, you
10 know, it would help me a lot if I was actually a voter
11 in each of these states. That would help my job. It
12 would lend authenticity and I could learn things that I
13 probably couldn't learn otherwise.

14 Now, does that add anything to the argument?
15 I mean, I don't think so, but it sounds a little bit
16 like you're making that kind of argument --

17 MR. GUPTA: No.

18 JUSTICE BREYER: -- and -- and they either
19 do have the right or they don't. And I don't know that
20 it helps that I -- that I say, well, I really want it
21 for my work.

22 MR. GUPTA: Right. But this is -- this is a
23 profession that has existed since the founding era. I
24 mean, we've, you know, we've cited cases in our opening
25 brief of -- of people hiring professionals to search the

1 records for them before engaging in property
2 transactions. By the late 19th Century, you had an
3 enormous industry that was designed to do this.

4 So this isn't -- Mr. Hurlbert isn't some --
5 someone who's making up some profession. He's part of a
6 very large industry that has done this for a very long
7 time. And that industry, yes, like lawyers depend on
8 courthouses or truckers depend on roads, his industry
9 depends on access to the public archives. And, you
10 know, it's true that -- that now you have these modern
11 public records laws, but I -- I think Virginia's
12 argument would be the same if you were just talking
13 about can -- can they bar the doors to the archives
14 building? Can they bar the doors to the property
15 records? So there's no -- I don't see any distinction
16 in kind --

17 CHIEF JUSTICE ROBERTS: Is this -- is this
18 your Privileges and Immunities argument or your dormant
19 Commerce Clause argument?

20 MR. GUPTA: You know, I think the logic of
21 both arguments are similar, but I think it most clearly
22 is illustrated in the Privileges and Immunities context
23 where --

24 CHIEF JUSTICE ROBERTS: So then it's not
25 enough that this is a big deal to your client. It has

1 to be something that is essential to hold the country
2 together as a national unit. And it seems to me it's a
3 bit of a stretch to say somebody gathering records about
4 commercial -- under FOIA fits that description.

5 MR. GUPTA: I don't think it's a stretch at
6 all, Justice -- Chief Justice. The -- the aggregators
7 of records make possible mortgage origination, credit
8 reporting, insurance adjustment. The -- the economy --
9 and you have an amicus brief --

10 CHIEF JUSTICE ROBERTS: No, but see, they're
11 just to get into those. Again, I think a lot of those
12 examples you -- you do have access under other statutes.
13 You're talking about mortgage rules and all that.
14 Aren't those all --

15 MR. GUPTA: No, no. Not to this kind of
16 information. The -- the information that Mr. Hurlbert
17 is gathering, tax assessment information, is essential
18 to -- to mortgage origination and credit reporting. The
19 people who hire him are large data companies, and the --
20 the data industry brief explains the uses of this
21 information. That -- that information is essential to
22 these activities. And Virginia, virtually alone among
23 the States, is -- is erecting this barrier to access
24 that market, and reserving the right to access that
25 market to only people who live in the State. And --

1 and, you know, this would be no different if it were
2 just talking about the archives that -- that include all
3 the information that the -- yes, it's true that Virginia
4 has exempted of the title itself, but I don't see that
5 the logic of their position allows them to make that
6 distinction. I mean, that's just a feature of their --
7 of their statute.

8 JUSTICE SOTOMAYOR: I'm still trying to
9 tease out what your claim is. Let's suppose Virginia
10 passes a statute that says: We'll let nonresidents have
11 access, but they have to pay all the costs.
12 Nonresidents don't. Would that satisfy you as valid?

13 MR. GUPTA: I think that would be a closer
14 question, but I think that presents some problems as
15 well. I mean, so in your hypothetical it's free to the
16 citizens of the State, but they're just passing the cost
17 on to out-of-Staters. And, you know, this -- this Court
18 in cases like Toomer and Mullaney have said that at
19 least, you know, where the State can show that the
20 nonresidents pose some unique evil, that the -- the
21 State is entitled to pass the costs on.

22 JUSTICE SOTOMAYOR: Why isn't it just -- you
23 just being costs them more?

24 MR. GUPTA: Right.

25 JUSTICE SOTOMAYOR: That was Justice

1 Ginsburg's point, which is every time you've put in a
2 request, you're costing them more money.

3 MR. GUPTA: Right. But -- but that would be
4 discriminating against not as -- noncitizens solely
5 because they're noncitizens. So if there's some
6 particular --

7 JUSTICE SOTOMAYOR: Well, why? You were
8 costing them more.

9 MR. GUPTA: Right. Well, that's -- that's
10 precisely the rationale that -- that in
11 Justice Kennedy's opinion for the Court in *Barnard v.*
12 *Thorstenn*, this Court rejected. This -- the Virgin
13 Islands wanted to say if we open up our bar to people
14 from all over the country, it's going to increase the
15 administrative resources, and this Court said, no,
16 that's not a good enough reason. That's just
17 discriminating on the basis of citizenship.

18 But if, for example, the State could show
19 that there was, you know, there were shipping costs that
20 were uniquely posed by nonresidents and they wanted to
21 assess a \$5 shipping fee for all nonresidents, that
22 might be permissible.

23 And if there are no further questions, I'd
24 like to reserve my time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 General Getchell?

2 ORAL ARGUMENT OF EARLE DUNCAN GETCHELL, JR.,

3 ON BEHALF OF THE RESPONDENTS

4 MR. GETCHELL: Mr. Chief Justice, and may it
5 please the Court:

6 The --

7 JUSTICE SOTOMAYOR: I'm not sure how you
8 save administrative costs under this statute. They
9 could go to any Virginia resident, it's not illegal, and
10 probably will, it'll cost them something more, but not
11 you, and get the very same information. So how do you
12 justify this discrimination? Because it's so easily --
13 the administrative cost is going to be imposed anyway.

14 MR. GETCHELL: I would suggest that the
15 purpose of the statute, which is political, not
16 commercial, left the State with the position that it was
17 going to subsidize with tax dollars this function
18 because we can't recover our overhead; we can over --
19 only recover the actual cost.

20 JUSTICE SOTOMAYOR: So you want to give more
21 businesses to Virginia citizens who will now charge
22 out-of-State residents money to process their FOIA
23 requests?

24 MR. GETCHELL: No, Your Honor. I don't
25 think anybody was thinking about businesses of any sort.

1 I think they were saying that we have a political
2 hygiene statute. They were very much the fad. It
3 happened in my lifetime, too. I remember when they were
4 adopted. Nobody thought they were commercial in nature.

5 And I do want to -- want to repel the notion
6 that there is even substantial discrimination in this
7 case, because Mr. Hurlbert, in his admission that this
8 is an as-applied challenge, has a difficulty with
9 substantial equality of access, because it turns out
10 that Mr. Hurlbert, in his reply brief, when he teed up
11 the 1786 statute, which does give access -- did give
12 access, he focused his argument on that statute. And if
13 you run that statute, you will find that between 1830 --
14 1813 and 1840, that you did not have general access.
15 They went back to having to show a particular interest.
16 But that -- from 1840, '41 until today, through the
17 codes of 1819 and -- and up until the present code,
18 Section 17.1208, he has the right of access to tax
19 assessment records.

20 CHIEF JUSTICE ROBERTS: So if I understood
21 your answer to Justice Sotomayor, the only reason you
22 don't let out-of-staters get these records is because of
23 the added overhead costs?

24 MR. GETCHELL: No, Your Honor. It's just
25 not part of the interests the State was trying to serve.

1 The State --

2 CHIEF JUSTICE ROBERTS: Well, I know.

3 But -- but -- so why don't you do it anyways? Just as I
4 asked your friend, it doesn't seem like that big a deal.
5 It doesn't seem like that big a deal for you either. If
6 you can recoup overhead costs from people who request,
7 and I'd assume you would be able to, why don't other
8 people -- people from West Virginia may have interest in
9 how Virginia government operates, too.

10 And -- and again, what cost is there to you
11 other than overhead? You don't want to keep how
12 Virginia government operates quiet from outsiders when
13 you let in -- its citizens get the access, do you?

14 MR. GETCHELL: The -- we are here to defend
15 the decisions of the two lower courts that apply
16 existing doctrine. And under existing doctrine, only if
17 we discover that this is a fundamental right do I have
18 to justify --

19 CHIEF JUSTICE ROBERTS: That's under the
20 Privileges -- Privileges and Immunities argument.

21 MR. GETCHELL: That's correct.

22 CHIEF JUSTICE ROBERTS: Okay. But what
23 about the Dormant Commerce Clause?

24 MR. GETCHELL: Under the Dormant Commerce
25 Clause, we would first have to have a regulation of

1 commerce that's discriminatory. And I would say that a
2 -- that this is a governmental function.

3 I would say that --

4 CHIEF JUSTICE ROBERTS: No, I know -- I
5 understand your argument. I'm just asking you why
6 bother? I mean, what -- what's the -- and that's
7 certainly pertinent to some of the Commerce Clause
8 analysis. And I haven't heard anything other than the
9 overhead costs. And I think you can recoup that from
10 the requesters.

11 MR. GETCHELL: I cannot, Your Honor.

12 CHIEF JUSTICE ROBERTS: Why not?

13 MR. GETCHELL: Mr. Chief Justice, the
14 statute says I cannot recoup the cost of maintaining and
15 generating the database, which is by definition
16 overhead. I cannot --

17 CHIEF JUSTICE ROBERTS: Well, you've got to
18 maintain and generate the database anyway for Virginia
19 citizens who are going to ask for it. This is not an
20 added cost. Other than -- it's an added cost if you
21 have to hire an additional person to handle -- as far as
22 I can tell, just these two people.

23 MR. GETCHELL: It's an added burden, too.

24 It's not all --

25 JUSTICE SCALIA: But the Virginia citizens

1 pay for that database, right?

2 MR. GETCHELL: They do. This is a --

3 JUSTICE SCALIA: And the out-of-staters

4 don't pay for the database.

5 MR. GETCHELL: This is a taxpayer subsidized
6 system.

7 JUSTICE SCALIA: And besides, do -- do
8 you -- is it the law that -- that the State of Virginia
9 cannot do anything that's pointless?

10 Only the Federal Government can do stuff
11 that's pointless?

12 (Laughter.)

13 MR. GETCHELL: The -- there is a
14 burden -- there is a non-financial burden as well,
15 because as one who is subject to FOIA requests, we have
16 a finite number of officials and employees who have to
17 address these things.

18 JUSTICE SOTOMAYOR: You keep making that
19 argument. But you don't stop residents for asking for
20 the information from someone else. I mean, that's one
21 of the points of your law, which is, they can hire a
22 Virginia resident to get it for them. Most of the big
23 people are doing that already.

24 So you're not saving any money if they can
25 get the information simply by paying someone in Virginia

1 to get it for them.

2 MR. GETCHELL: In -- in fact, the State of
3 Virginia has made the policy decision to give this
4 information to its citizens, and not to inquire behind
5 it to see whether or not somebody's doing it for an
6 out-of-Stater.

7 JUSTICE SCALIA: Or even for commercial
8 purposes. Don't you think if -- if those who created
9 these government in the sunshine laws could have drafted
10 them in such a way that inquiries for commercial
11 purposes would not be allowed, but only those inquiries
12 that are intended to look into the workings of State
13 government and produce government in the sunshine, don't
14 you think that they probably would have excluded
15 commercial inquiries if they could?

16 But you can't tell which ones are commercial
17 and which aren't.

18 MR. GETCHELL: And we don't -- and we don't
19 try. We have a policy decision that we want to have a
20 very simple system that allows our citizens to make
21 inquiries without a demonstrated need or cause, because
22 we want there to be sunshine.

23 CHIEF JUSTICE ROBERTS: It's no more
24 complicated in the system if you let out-of-Staters have
25 access, too. You say we want a simple system. It's

1 going to be the same system whether you win or lose.

2 MR. GETCHELL: The thing that is of -- of
3 great concern -- why do we care? Why do we bother -- is
4 the principle that when a government is providing a
5 taxpayer-subsidized service of recent origin to its
6 citizens, that it does not have to explain its choice
7 either under the Privileges and Immunities Clause or
8 under the Dormant Commerce Clause. It is very important
9 that we not find ourselves with lawsuits that say
10 "services." Voluntary services are in fact things that
11 now have to be justified under those two provisions of
12 the Constitution.

13 JUSTICE BREYER: That's where he comes in
14 with his argument. Because I -- I agree, you can -- you
15 don't have -- let's say the most fabulous reason for
16 doing this, but you have a reason. And so the question
17 is, does it have to be better than that?

18 And -- and they are saying yes. And as I
19 heard it, what I would characterize as a strong
20 argument, which sort of first of all strikes me as a
21 stronger argument, is that, look, if we go back into
22 history, out of State real estate people could always
23 get information about property -- let's say they had a
24 client who wanted to buy it.

25 Now, you've protected that. But in today's

1 world, it's important that we get statistics about this,
2 too, because our economy is national. If we understand
3 how States are taxing their real estate, we will know to
4 what extent they increase the value, to what extent they
5 increase the rate, to what extent they really get the
6 money they are supposed to, to what extent they might
7 get money or not get money in the future. And all of
8 those things are nationally important so people can put
9 them together and make, better than we have done in the
10 past, predictions about what is likely to happen to
11 States, and hence, the national economy. All right?

12 That's -- that's the kind of argument he's
13 making. So therefore, there is a national interest in
14 the flow of this information. And that means you have
15 to have a better than "uh-huh" kind of rationale.
16 That's -- that's what he's saying.

17 MR. GETCHELL: But it's very difficult for
18 Mr. Hurlbert to make that fairly expansive argument,
19 because it turns out --

20 JUSTICE BREYER: Well, to be fair, I -- I
21 was sort of expanding it.

22 (Laughter.)

23 MR. GETCHELL: But in point of fact, because
24 he is entitled to the tax assessment data in the clerk's
25 office, in the case of Henrico County, where he went,

1 you go in the same building and -- if you're Mr.
2 Hurlbert, you turn in one direction and go to the
3 clerk's office. And if somebody's in Virginia and wants
4 to -- for whatever reason get it from the tax assessor's
5 book instead of from the clerk's book, you turn in the
6 other direction.

7 JUSTICE KAGAN: But you don't deny that in
8 general, this does affect out-of-State data collectors,
9 people who are engaged in the kind of business that
10 Justice Breyer was talking about. Is that right?

11 MR. GETCHELL: I have no idea in this
12 record, because we were on summary judgment -- cross
13 motions for summary judgment, and the district court of
14 the court of appeals both in our judgment correctly
15 ruled that there's a two-step inquiry. And the first
16 step is whether or not there is a fundamental right.
17 And in the absence of a fundamental right --

18 JUSTICE SOTOMAYOR: Only in his Privileges
19 and Immunities Clause claim. He claims that the Dormant
20 Commerce Clause has been effected because he reads this
21 statute as saying only Virginia recording companies have
22 access. Out-of-State can't. And it's a fair reading of
23 the statute. It only permits Virginia residents, which
24 include commercial and noncommercial, to access the
25 information.

1 So assume hypothetically that the statute
2 reads "only Virginia commercial businesses have access
3 to this information" --

4 MR. GETCHELL: If -- if in fact you want to
5 rewrite the statute to -- subject it to attack,
6 obviously, that would then raise questions about a
7 nongovernmental protectionist intent. But that's not
8 the way this statute was written. It's not how it was
9 crafted, and it has nothing to do with commerce.

10 JUSTICE SOTOMAYOR: Well, that's the
11 question I'm -- I'm raising the best argument for your
12 adversary, okay?

13 MR. GETCHELL: Right.

14 JUSTICE SOTOMAYOR: Because we could call it
15 a direct -- he calls it direct discrimination, because
16 commercial businesses are being permitted in Virginia
17 but not noncommercial. You say it's indirect.

18 How do we draw the line between direct and
19 indirect when the bottom-line consequence is the same?

20 MR. GETCHELL: I would have about three
21 answers to that. The first one is that we don't trigger
22 the Dormant Commerce Clause analysis unless we are
23 exercising the police power of a state to regulate
24 commerce. And that means, it does mean that not every
25 statute a state passes triggers an inquiry, even if it

1 has an indirect effect on commerce.

2 Whereas here, we have a statute that has a
3 solely political intent, the fact that now the amici
4 want to tell us about this great burgeoning enterprise,
5 they want the Court to take --

6 JUSTICE KENNEDY: Are you telling us that
7 there is simply no commercial consequences to this
8 statute at all, that Virginians find this to be of no
9 commercial value in any instance?

10 MR. GETCHELL: I am totally agnostic on this
11 record because we don't have any data on that.

12 JUSTICE KENNEDY: Well, you were the one
13 with summary judgment. Maybe they didn't come forward
14 with the information, but we interpret summary judgment
15 in favor of the losing party.

16 And so you say you are totally agnostic. I
17 am concerned you are preventing them by the summary
18 judgment from showing that their -- even with
19 Virginians, there is a commercial value frequently to
20 this information.

21 MR. GETCHELL: All right.

22 JUSTICE KENNEDY: It's not just political.

23 MR. GETCHELL: On this record -- on this
24 record the position that was accepted by the two courts
25 below entirely in accordance with this Court's existing

1 doctrine was the first inquiry under Privileges and
2 Immunities was whether there was a fundamental right.
3 If there is not then we make no further inquiry.

4 JUSTICE KENNEDY: Let's talk about the
5 Commerce Clause. You are saying you are agnostic. You
6 have no idea whether or not there might be some
7 commercial value to this information. I would think as
8 an officer of the State of Virginia or as a matter of
9 judicial notice we would take notice that there is.

10 MR. GETCHELL: I'm saying that under this
11 record that never came up nor should it have come up,
12 because what the court said on Dormant Commerce Clause,
13 both of the courts below, was this was not a regulation
14 of commerce, it is a governmental action --

15 JUSTICE GINSBURG: But it has --

16 JUSTICE SCALIA: You are saying that it's no
17 more necessary for you to show that there's no
18 commercial value to allowing out-of-staters to do this
19 than it is necessary for you to show that there is no
20 commercial value to your not allowing out-of-staters to
21 hunt deer in Virginia.

22 MR. GETCHELL: I believe you are correct.

23 JUSTICE SCALIA: You are saying that it's up
24 to Virginia --

25 MR. GETCHELL: Correct, Your Honor.

1 JUSTICE SCALIA: -- whether out-of-staters
2 can hunt for Virginia game.

3 MR. GETCHELL: Correct.

4 JUSTICE SCALIA: And it's up to Virginia
5 whether out-of-staters can have access to the State's
6 records, that they have no interest in personally, under
7 this law. It seems to me perfectly logical.

8 MR. GETCHELL: But remember they do have
9 access to this information, both Hurlbert and McBurney.

10 JUSTICE KENNEDY: That assumes the question
11 as to whether or not there is a general commercial
12 interest in these -- in these -- in these documents.
13 And you say, oh, you are agnostic. At least that means
14 you are open to the possibility that there might be a
15 commercial interest.

16 MR. GETCHELL: Here's the problem in this
17 case. Because I think that we are not at first-tier
18 analysis because there is no regulation of commerce that
19 is discriminatory --

20 JUSTICE SCALIA: If that's your argument on
21 it, I reject it as Justice Kennedy does. I didn't
22 understand you to be arguing that there is no commercial
23 value.

24 MR. GETCHELL: I'm trying to explain why it
25 doesn't matter.

1 JUSTICE SCALIA: Yeah, that's what I
2 thought.

3 MR. GETCHELL: It doesn't matter because if,
4 on the threshold inquiry, we don't have a discriminatory
5 regulation of commerce but just an ordinary governmental
6 function than only Pike-Church analysis could
7 possibly --

8 JUSTICE SCALIA: You can't say
9 discriminatory regulation. What about tax? I mean, you
10 can't tax discriminatorily, and I wouldn't call taxation
11 in and of itself a regulation of commerce, would you?

12 MR. GETCHELL: The fact of the matter is
13 that it has been -- taxes have been found to be both
14 violations of privileges and immunities and Dormant
15 Commerce Clause where there was unequal taxation of
16 commerce.

17 JUSTICE SCALIA: Even though it's -- even
18 though it's not a regulation of commerce?

19 MR. GETCHELL: Okay. Well --

20 JUSTICE SCALIA: Okay. That's your argument
21 then.

22 MR. GETCHELL: I apologize I chose a word
23 that is not as apt as it should have been, but a
24 regulation or taxation centering around commerce
25 intended to affect and actually affecting commerce, this

1 just isn't that kind of activity.

2 JUSTICE KAGAN: Well, general, just indulge
3 me with a hypothetical. Suppose that the backgrounds
4 for these statutes was different. The statutes were the
5 same, but in addition to talking about people's right to
6 know about how their government works, the people spend
7 a lot of time also talking about the economic benefits
8 of a free flow of information in our country.

9 Would that -- if that were true, and I want
10 to put myself on record as not remembering when these
11 statutes were passed --

12 (Laughter.)

13 JUSTICE KAGAN: But if that were true, would
14 this case be different or would you still be up here
15 saying the same thing?

16 MR. GETCHELL: If I had -- if I had a
17 statute which on its face dealt with commerce --

18 JUSTICE KAGAN: The statute does exactly the
19 same thing. I'm just suggesting that there might be two
20 interests behind the statute; one is about knowing the
21 way your government operates and the other is about free
22 flows of information in the economy. And if both of
23 those things had gone into the mix to create the
24 statutes of this kind, would you be up here saying the
25 same thing or not?

1 MR. GETCHELL: I would be saying something
2 at least slightly different if I had different facts
3 that I had to deal with, but I think in principle I
4 would be arguing the power of the State to pass this
5 kind of act without having to submit to the Dormant
6 Commerce Clause, at least first-tier Dormant Commerce
7 Clause analysis.

8 JUSTICE GINSBURG: What else can Virginia do
9 besides -- I don't know if there are elk in Virginia,
10 but besides -- to reserve for its own -- for its own
11 people? You say, this is -- good government in Virginia
12 is for Virginians. Big game hunting, scarce resource,
13 can be reserved for in-state people. What else can
14 Virginia do?

15 MR. GETCHELL: Well, Virginia can do things
16 including have in-state tuition. It can have -- it can
17 subsidize it's own businesses either by training
18 programs or even by other direct subsidy from public
19 FISK. It limits welfare payments to residents of the
20 Commonwealth.

21 When the Commonwealth is just acting as a
22 government and not as a regulator or taxpayer of interstate
23 commerce, it has the status of a coequal sovereign that
24 in its own sphere is allowed to do its own policy
25 choices.

1 JUSTICE KAGAN: I think the thing, general,
2 that I was trying to get at, it seems to me you have a
3 very good case that these statutes were meant for a
4 different purpose. But in fact, it seems as though your
5 friends there have a good case that these statutes have
6 been taken over, to a large extent, across the country
7 by economic enterprises doing economic things. And at
8 that point in time, Virginia's -- and, you know, you are
9 only one of two States -- Virginia's maintenance of this
10 kind of -- no, it's Virginians, Virginia information for
11 Virginians, looks very different from what it might have
12 looked like when the statute was originally passed.

13 MR. GETCHELL: If -- if we were going to
14 say, if you were going to say that this is an inquiry
15 that needs to be made under the Commerce Clause, this
16 would be a particularly poor vehicle for doing it,
17 because, the Fourth Circuit held that the Pike analysis
18 of the district court was not appealed, and therefore
19 this case could not be sent back on remand to develop a
20 burden analysis of a record --

21 JUSTICE KENNEDY: But Pike is not relevant
22 here. Pike involves -- the Southern Pacific v. Arizona
23 where there were melons -- where there were melons and
24 Arizona wanted to make sure that you had labels and
25 packing of the melons in Arizona. That was

1 discriminatory against interstate commerce.

2 That's not -- that's not Dormant Commerce
3 Clause but that is discrimination, and there is
4 discrimination here.

5 MR. GETCHELL: Well, there's -- there's
6 discrimination only in the sense that we discriminate
7 against people who we don't let vote because they don't
8 live in the Commonwealth as well. I mean, we -- this
9 statute has a function. It's a legitimate function, and
10 --

11 JUSTICE KENNEDY: You -- you could say the
12 same thing, we don't discriminate against Californians
13 who want to come and pack their melons in Arizona.

14 MR. GETCHELL: Well, I would say that --
15 that whether or not somebody can deal with an item in
16 commerce is -- is -- raises Commerce Clause questions.
17 And just like in *Reno v. Condon*, where the State of
18 South Carolina was choosing to take its records and sell
19 them into the stream of commerce, there the Court held
20 that -- that they thereby became a thing in commerce.

21 The records of the tax assessor of the
22 County of Henrico, which are available through the
23 clerk's office to Mr. Hurlbert, are not things or
24 persons in commerce, nor are they --

25 JUSTICE KENNEDY: It -- it would surprise me

1 if an out-of-State investor who was thinking of putting
2 a large plant in Virginia had absolutely no interest in
3 Virginia's tax policies.

4 MR. GETCHELL: But they are available. They
5 are publicly available. They are not just not available
6 through this adjunct service. All -- all FOIA is, is a
7 device where you don't have to go and look. There has
8 always been public access for these -- these records.

9 JUSTICE BREYER: But there -- there --
10 suppose -- I think they have an argument, saying of
11 course this information would be useful for gathering
12 national statistics and helping the national economy. I
13 think that's true.

14 On the other hand you say, well, but look,
15 there must be something left that the States can reserve
16 to their own citizens. There must be something. They
17 can't protect their own commerce; that's clear. They
18 can't discriminate against people who want to come here
19 and live here. That's clear.

20 They can't do this and that and the other
21 thing, but gee, there must be something. I mean can't
22 they reserve at least their -- their beaches for their
23 own citizens? No. Parking near their beaches? Well,
24 maybe. And -- and maybe deer. And if not this, what?
25 That's the end. Okay?

1 So that's basically what you are saying.

2 This is just an interest in trying to find out how State
3 institutions work, and the voters have the main interest
4 there, and this is other -- so you say the other one is
5 attenuated, but not non-existent.

6 He says the other is important, though he
7 recognizes States should be able to do something.

8 So if you were me, how would you decide?
9 How would you choose? What is the standard, because you
10 know the -- the Privileges and Immunities Clause is --
11 is considerably opaque, and there are very few cases on
12 it. And so what -- how would you tell me to -- to
13 resolve that -- that tension, because there is a
14 tension.

15 MR. GETCHELL: I -- I think there that --
16 that the important policy issue in this case for us is
17 precisely as you articulated. There -- there is
18 residual sovereign power in the State to act, and we
19 have to violate the Constitution, clearly, before we
20 lose that authority. And under existing privileges and
21 immunities doctrine, the privileges and immunities are
22 --are few; they are -- they have been enumerated in the
23 courts, they are similar in character having to do with
24 commerce, not governmental action. So I would say you
25 would not extend privileges and immunities.

1 JUSTICE SCALIA: We are talking about
2 State-owned documents, aren't we?

3 MR. GETCHELL: Yes, Your Honor.

4 JUSTICE SCALIA: There is not much that's as
5 close to the sovereignty of the State as the possession
6 and right to exclude people from its own records and its
7 own documents, right?

8 MR. GETCHELL: I agree, Your --
9 Justice Scalia.

10 JUSTICE SCALIA: So the -- the issue is, can
11 the State allow its own citizens for purposes of seeing
12 that the government is -- is being run on the up-and-up,
13 have access to those documents without letting the whole
14 world?

15 MR. GETCHELL: Yes, Your Honor, that is our
16 position.

17 JUSTICE SOTOMAYOR: So why doesn't the
18 dormant Commerce Clause affect the hypothetical I laid
19 out? Because directly this permits Virginia commercial
20 businesses to get something that out-of-staters can't.
21 The State is putting this instrument into commerce. You
22 say, I don't know that. But make the assumption that we
23 think the record's clear enough on that point.

24 I know you want to fight me on that, but
25 it's hard -- it's a fight with no legs. Because you

1 have to know that commercial enterprises in Virginia
2 seek these records.

3 MR. GETCHELL: I am -- I am arguing that --
4 of course I think we say in our brief that -- that they
5 can be put into commerce. They are put into commerce.
6 But we don't put them into commerce. And we have -- in
7 the architecture of our bill, our act has nothing to do
8 with commerce. And if a State can't deal with --

9 JUSTICE SOTOMAYOR: Tell us under our
10 jurisprudence, the dormant Common Commerce
11 jurisprudence -- I have colleagues who don't -- who
12 don't believe it should exist. Take that argument out.
13 Why is this not a dormant Commerce Clause case?

14 MR. GETCHELL: Because it is not an exercise
15 of the State police power to regulate commerce. The
16 documents in the -- in the tax assessor's office of the
17 County of Henrico are not things or persons in commerce,
18 nor are they channels or instrumentalities of commerce.
19 They are just the records of the sovereign, which we
20 will allow our citizens to obtain.

21 Unless the Court has further questions, I
22 think this argument has been developed from our
23 standpoint.

24 CHIEF JUSTICE ROBERTS: Thank you, General.

25 Mr. Gupta, you have three minutes remaining.

1 REBUTTAL ARGUMENT OF DEEPAK GUPTA
2 ON BEHALF OF THE PETITIONERS

3 MR. GUPTA: Thank you. Just a few quick
4 points.

5 First, I just want to clear up on the
6 statute, I want to make it clear that this statute does
7 allow the State to fully recoup its costs, including
8 administrative costs, and the State hasn't said
9 otherwise.

10 And secondly, the suggestion has been
11 made --

12 JUSTICE SCALIA: Excuse me. The -- I -- I
13 think what he's saying is: You don't have to pay the
14 costs of developing and maintaining those records, which
15 costs are paid by the citizens of Virginia, which gives
16 them an additional interest in being able to get to
17 those documents. You -- you don't claim that -- that
18 you pay for the development and the maintenance of those
19 records. You just pay for the incremental costs of
20 giving it to you, right?

21 MR. GUPTA: That -- that's right,
22 Justice Scalia --

23 JUSTICE SCALIA: -- and Virginians pay for
24 all the rest?

25 MR. GUPTA: That -- that's right, Justice

1 Scalia, and that's true of other things, like roads and
2 courthouses. And I think this gets to -- Justice Breyer
3 asked for our test to try to differentiate this from
4 other services and I'd like to try to provide one.

5 I think, at least where you've got a
6 function that is reserved to the State -- only the State
7 can do it, only the State can run the archives -- it's
8 necessary as a channel to -- to commerce. And in the --
9 in the modern economy, this is as much part of the
10 information infrastructure as transportation is, like
11 courthouses, like archives, like roads.

12 It would not stretch limited resources; it
13 would not cost the State additional money; and it would
14 not jeopardize important local traditions or
15 institutions --

16 JUSTICE GINSBURG: Are you leaving out --

17 MR. GUPTA: -- and I think we feel
18 comfortable --

19 JUSTICE GINSBURG: Are you leaving it --
20 you -- you switched now -- and you were led there but
21 you switched to the Dormant Commerce clause. What about
22 your other client, McBurney? He doesn't have any
23 Dormant Commerce clause claim.

24 MR. GUPTA: Right. And I -- I think the
25 test that I just laid out would work for both clauses.

1 It's a limiting principle on the justification side.

2 But that's right: Mr. McBurney does not
3 have a Dormant Commerce clause claim. His claim is
4 based on equal access to proceedings.

5 He wanted to get recovery of child support
6 that he was owed. So he is a creditor seeking to pursue
7 a debt on equal terms with people in the state of
8 Virginia, and the State set up a process: As one step
9 along the way to court, you go to the agency; you ask
10 the agency to enforce. The agency has unique
11 enforcement tools. It can suspend someone's driver's
12 license, for example. It can -- it can intercept income
13 tax refunds, and it can go to court on your behalf. And
14 all he's asking for is the rules of the game. He wants
15 to know what procedures apply to that process. And at
16 least where a -- an agency has a process that directly
17 affects a non-stater in the pocketbook, all we are
18 saying is that equal access to the proceedings means
19 equal access to the information governing those
20 proceedings.

21 And, finally, I would just like to close by
22 saying that, you know, what I don't think we heard on
23 the justification side from the State was really any
24 justification, because the State can recoup its costs.
25 And so they are not saying that this will cost them

1 anything more. Which was the only justification they
2 pressed in -- in the courts below.

3 And so they are left with the position that
4 they can discriminate simply because they think they
5 can. And if you look at the Privileges and Immunities
6 clause, it sits right next to the Full Faith and Credit
7 clause, which indicates, if anything, that the Framers
8 thought that the movement of public records across state
9 lines was important to interstate comity. They changed
10 the Articles of Confederation version, which did not
11 include public records; it only referred to judicial
12 records. They added a mention of judicial records --
13 nonjudicial records and saw that that was important
14 to -- to comity across state lines.

15 But -- but their position is about the step
16 before that. It's about whether you get the records in
17 the first place. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
19 The case is submitted.

20 (Whereupon, at 11:16 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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